United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 27, 1989

TO : Emil C. Farkas, Regional Director
Region 9

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: Frank W. Schaefer, Inc.
Case 9-CA-25539

530-6001-2500
530-8045-8700
590-0100
590-7575-2500

This case was submitted for advice as to whether, in light of Deklewa [1] and its progeny, the relationship between the parties is governed by Section 8(f) or 9 of the Act, and whether the Employer is bound by its conduct to a collective-bargaining agreement.

FACTS

Frank W. Schaefer, Inc. (the Employer) is engaged in the design, manufacture, installation and rebuilding of industrial furnaces, as well as the installation of wear resistant material used for nonfurnace industrial purposes. In the conduct of his business the Employer employs laborers who are represented by Laborers' Local Union No. 1410 (the Union). The Union has executed successive collective bargaining agreements with the Association of General Contractors (AGC). Although the Employer denies having ever authorized the AGC to negotiate on its behalf, it has separately executed several of these agreements. [2] The Region has found that the Employer is

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[1] John Deklewa and Sons, 282 NLRB No. 184 (February 20, 1987) enf'd. 843 F.2d 770 (3d Cir. 1988), cert. den. 129 LRRM 2528 (1988).

[2] The most recent AGC-Laborers agreement executed by the Employer is the 1978-1981 agreement. However, although it never formally executed the 1984-1987 AGC-Laborers agreement, the Employer concedes it was bound by that contract. Further the Union is not contending that the Employer is bound to the new AGC-Laborers agreement by virtue of membership in the AGC.

engaged in the building and construction industry, and that the AGC-Laborers agreements are Section 8(f) agreements.

The 1984-1987 agreement was due to expire on April 30, 1987. On February 27, 1987 the Employer notified the Union that it intended to negotiate independently of the AGC and that it desired to negotiate with the Union to modify or amend the agreement then in force. The parties never met to negotiate and on April 30, 1987 the agreement expired.

On July 1, 1987 the AGC and the Union signed a new agreement effective through April 30, 1989. The Employer did not participate in those negotiations and never signed the agreement. However, in July, 1987 the Employer adjusted the employees' wages and benefits in accordance with the new agreement.[3] When an increase in wages was due again on May 1, 1988 in accordance with the AGC-Laborers agreement, the Employer failed to implement the wage increase. The Employer has, without interruption, continued to make fringe benefit payments as set forth in the 1987 AGC-Laborers agreement and has deducted and forwarded the applicable union dues to the Union. The Employer has also continued to use the referral provisions of the agreement.

Around mid-May 1988, the Laborers received a notice from FMCS filed by the Employer on May 10, 1988 which asserts that no agreement has been reached between the parties since the April 30, 1987 expiration of their 1984-1987 agreement. The Union, in turn, contacted the AGC and asked that it obtain the Employer's signature on the 1987-1989 AGC-Laborers agreement. On June 29, 1988, the Employer's attorney informed the Union that the Employer was not bound by the current AGC-Laborers agreement. He stated,

> The Employer has no reason to believe that the Union no longer represents its Laborer employees and therefore recognizes that there exists at this time an obligation

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[3] The Employer contends that the wage adjustment was due to a clerical error. After the new AGC-Laborers agreement was negotiated, the AGC sent the Employer a memo indicating the new wage rates and the required contributions to the funds. This memo went to the Employer's payroll office where a payroll clerk, on her own, put the new wages/benefit payments into effect.

to negotiate a collective bargaining agreement covering these employees.

On the same date the Employer sent under separate cover a contract proposal which included a 30-day union security provision, a non-exclusive referral provision, and a reduced wage structure. In subsequent correspondence to the Region, the Employer's attorney has reiterated the Employer's interest in negotiating with the Union, based on its "appreciation" of the "employees' desire to be represented by the Union." Though the Employer has consistently maintained that it has an obligation to bargain with the Union, and recognizes the Union as the representative of its employees, the Employer has simultaneously claimed that its relationship with the Union is governed by Section 8(f) of the Act.

The instant charge claims that the Employer is bound to the agreement by its conduct and therefore violated Section 8(a)(1) and (5) by refusing to sign and by repudiating the agreement.

ACTION

We concluded that the relationship between the Employer and the Union is governed by Section 8(f) of the Act, and therefore the Employer's conduct did not bind it to the AGC-Laborers agreement. The Region should therefore dismiss the charge, absent withdrawal.

In Deklewa, the Board stated that Section 8(a)(5) imposes no obligations upon a union and an employer after the expiration of a Section 8(f) contract.[4] Thereafter, the Board held in Yellowstone Plumbing,[5] that an employer did not violate the Act by making unilateral changes after the expiration of a Section 8(f) contract.[6]

In Brannan Sand and Gravel Co.,[7] the Board restated its Deklewa holding that the party asserting the existence of a Section 9 relationship has the burden of establishing such a

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[4] Deklewa, slip op. at 39.
[5] 286 NLRB No. 93 (November 20, 1987).
[6] Id., slip op. at 3.
[7] 289 NLRB No. 128 (July 20, 1988).

relationship, and that bargaining relationships in the construction industry, even those which began before the effective date of the 1959 amendments which added Section 8(f) to the Act, would be presumed to be Section 8(f) relationships. A party may overcome the presumption in favor of 8(f) either through a Board-conducted representation election, or a union's express demand for, and an employer's voluntary grant of, recognition to the union as bargaining representative, based on a contemporaneous showing of union support among a majority of the employees in an appropriate unit.[8] With respect to the Union's demand and the employer's acceptance, "there must be evidence that the union unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such." [9] Thus, to prove that a relationship in the construction industry is a Section 9 relationship, there must be (1) a union demand to be recognized as the Section 9 representative; (2) an employer acceptance of the union's demand; and (3) majority status at the time of such demand and acceptance.

We conclude that the relationship between the Employer and the Union in the instant case is governed by Section 8(f) of the Act. There is no evidence to indicate that the Union has made an unequivocal demand for recognition. In addition, there is no "positive evidence"[10] that the Employer voluntarily extended recognition to the Union as the 9(a) representative of its employees. Although the Employer has recognized a "desire" of the employees to be represented by the Union, and has asserted an obligation to bargain with the Union, these statements are the only indicia of an Employer intention to establish a Section 9 relationship. Pointing the other way is the Employer's express and specific statement that its relationship with the Union is not governed by Section 9. Finally, there has been no showing that the Union represents a majority of the employees in the appropriate unit.[11] Even if

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[8] See Brannan Sand & Gravel Co., slip op. at 9.

[9] J & R Tile, Inc., 291 NLRB No. 144, slip op. at 9 (December 8, 1988).

[10] Id., slip op. at 9.

[11] [*FOIA Exemption* 5

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the Union does, in fact, represent a majority of the Employer's employees, J & R Tile makes clear that there must be explicit proof presented contemporaneously with the Union's demand and the Employer's voluntary recognition.[12] Thus, although the Employer's ambiguous statements arguably may indicate that it believed the Union had majority support, those statements are insufficient to confer 9(a) status upon the Union without actual demonstration of that majority status.

Having determined that the relationship between the parties is governed by Section 8(f), we further conclude that the Employer did not adopt the 1987-1989 AGC-Laborers contract by its conduct. The Board has held that the adoption-by-conduct doctrine is not applicable in 8(f) cases.[13] Additionally, in McLean County Roofing and Accurate Roofing,[14] the Board stated,

> That the Respondent substantially followed most of the provisions of the agreement is not a substitute for a voluntary agreement on all material terms which is binding on the parties. The absence of such an agreement is particularly critical here, in an 8(f) relationship, when the Union's access to the provisions of Section 8(a)(5) can only be secured from, and is limited to, the duration of a valid 8(f) agreement.[15]

[*FOIA Exemption* 5, cont'd.

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[12] In J & R Tile, the employer clearly knew that a majority of his employees belonged to the union, since he had previously been an employee and a member of the union. However, the Board found that in the absence of positive evidence indicating that the union sought, and the employer thereafter granted, recognition as the 9(a) representative, the employer's knowledge of the union's majority status was insufficient to take the relationship out of Section 8(f). Id., slip op. at 10-11.

[13] Garman Construction Co., 287 NLRB No. 12, slip op. at 4, fn. 5 (December 14, 1987).

[14] 290 NLRB No. 82 (July 29, 1988).

[15] Id., slip op. at 6-7.

The Employer here actually had executed a series of contracts with the Union, the most recent of which expired on April 30, 1987. Subsequently, the Employer abided by some of the terms of the new AGC-Laborers agreement. However, it is clear from Garman and McLean County Roofing that the Employer did not bind itself to the new contract merely by complying with some of its provisions for a period of time. Moreover, the Employer's failure to respond to the Union's request that it sign the new agreement cannot be said to constitute a "voluntary agreement" to a new Section 8(f) contract.

Accordingly, since the Employer was not bound by the AGC-Laborers 1987-1989 agreement, the Section 8(a)(5) charge should be dismissed, absent withdrawal.

H.J.D.